Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 703(e) of the Telecommunications Act of 1996	)	CS Docket No. 97-151
	)	
Amendment of the Commission's Rules and Policies Governing Pole Attachments	)	

COMMENTS OF THE ELECTRIC UTILITIES COALITION

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Executive Summary

In these Comments, the Electric Utilities Coalition builds upon its Comments and Reply Comments filed in CS Docket No. 97-98 regarding the pricing of cable and telecommunications attachments to utility poles. The Electric Utilities herein urge the Commission to carefully consider their previous Comments, which are incorporated by reference, in that the issues raised in the prior proceeding fundamentally impact the underlying basic formula at issue in both the prior and the instant proceeding. The Electric Utilities implore the Commission to pay particular attention to the necessity of creating separate rates for 30-foot and 40-foot pole classes and of assigning to the cable and telecommunications attachers the 40 inches of safety space separating utility lines from cable or telecommunications attachments. It is also critical that the Commission refamiliarize itself with the Electric Utilities' discussion of the need to include additional FERC accounts in the calculation of costs captured by the Commission's pole attachment formula.

As to matters implicated solely by the NPRM in the instant proceeding, first, for purposes of implementing Section 224(e)(2), only "attaching entities" should be counted. The number of attachments per entity and the number of feet of occupied usable space are irrelevant in the context of implementing Section 224(e)(2). Furthermore, entities attaching traffic signals and other similar attachments which do not fall within the definition of "telecommunications services" should not be counted in allocating unusable space. The number of attaching entities per pole should be established by each utility using a reasonable methodology consistent with reasonably available data.

Next, usable space for telecommunications carriers other than ILECs should be 12 inches, plus the 40-inch safety zone. The 40-inch safety zone, however, is presumed to be shared with one cable and one telecommunications carrier, resulting in a 32-inch allocation of usable space to each.

In addition, pricing under Section 224(e) should be much more flexible than under Section 224(d) due to the less constraining language of the statute and the intent and purpose of the 1996 Act. Forward-looking replacement costs should be used to establish the capital component of presumptively applicable, maximum just and reasonable rates. The pricing and allowance of overlashing should be determined by negotiation, with a presumptively applicable maximum rate set as though each cable were a separate attachment.

Finally, the Commission must appreciate that electric utility conduits are far different from telecommunications conduits. As such, the Commission should establish pricing for electric utility conduits on a company-specific basis using replacement costs. For purposes of allocating costs, the Commission must recognize that only the actual ducts, and not the other parts of an electric utility conduit, are usable. All other portions of conduit systems, therefore, should be deemed unusable space. As to rights-of-way, because they are unique in character, and because the state laws and property rights implicated in obtaining and holding easements are so varied, no presumptively applicable rate can be set for rights-of-way on a generic basis.

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TO: The Commission

JOINT COMMENTS OF THE ELECTRIC UTILITY COALITION

Carolina Power & Light Company, Delmarva Power & Light Company, Atlantic City Electric Company, Entergy Services, Florida Power Corporation, Pacific Gas and Electric Company, Potomac Electric Power Company, Public Service Company of Colorado, Southern Company, Georgia Power, Alabama Power, Gulf Power, Mississippi Power, Savannah Electric, Tampa Electric Company, and Virginia Power, including North Carolina Power, (each an "Electric Utility," collectively, "Electric Utilities"), by their attorneys, hereby file their Comments in response to the July 1, 1997, Notice of Proposed Rule Making ("NPRM") issued by the Federal Communications Commission ("FCC" or "Commission") in CS Docket No. 97-151.

I. INTRODUCTION

The mandatory access provisions added to Section 224 of the Communications Act of 1934, as amended,[1] by Section 703(f) of the Telecommunications Act of 1996,[2] significantly

1. 47 U.S.C. § 151 et seq.

impact the Electric Utilities. The Electric Utilities have in the past, and will in the future, work cooperatively with cable and telecommunications providers to accommodate legitimate requests for the joint use of facilities. It is essential, however, that the regulations and guidelines adopted by the FCC in this and related proceedings ensure the Electric Utilities both full compensation for the services they are now required to provide, and adequate authority to protect the integrity of their electric distribution systems. In this regard, while the Electric Utilities support the competitive objectives of the 1996 Act, the Electric Utilities urge the Commission to recognize that the Electric Utilities are fundamentally different from incumbent local exchange carriers ("ILECs") and other communications entities. More importantly, the Electric Utilities should under no circumstances be required to directly or indirectly underwrite or subsidize the telecommunications industry.

The Electric Utilities have filed extensive comments in CS Docket No. 97-98 ("Initial Comments" and "Reply Comments," collectively "Phase I Comments") which, in accordance with the Commission's edict, NPRM at para. 8, the Electric Utilities incorporate herein by reference.[3] Where appropriate, these Comments will make reference to the Phase I Comments, but they do not restate the Electric Utilities' position in detail.

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2. (...continued)
2. Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act").

3. As in the Phase I Comments, the Electric Utilities note for purposes of the instant proceeding that the statutory provisions which form the basis for this rule making are currently being challenged in the Federal District Court for the Northern District of Florida. The basis for the suit is, *inter alia*, that the mandatory access provisions in the 1996 Act result in an unconstitutional physical taking of property in violation of the Fifth Amendment of the U.S. Constitution. The Electric Utilities are participating in this proceeding without waiving any arguments relevant to the Florida litigation.

There are several fundamental issues raised in CS Docket No. 97-98 that are equally critical to the Commission's rulings in this docket. Generally, they relate to problems the Electric Utilities have identified in the basic pole attachment formula which the Commission proposes to carry forward and incorporate into the rules for implementing Section 224(e). Among the most critical changes which the Electric Utilities believe must be made to the formula are:

- setting separate, presumptively applicable, maximum rental rates for 30-foot poles and for 40-foot poles in electric utility systems;
- assigning the 40-inch safety zone as space used and required solely by the presence of cable and telecommunications attachments;
- including additional capital and recurring operation and maintenance accounts in the formula in order to move closer to fully allocating attachment costs; and
- adjusting assumptions about pole heights and the amount of unusable space created by proper application of the National Electric Safety Code ("NESC") to achieve necessary ground clearances.

Other issues raised in the Electric Utilities' Phase I Comments that play a significant role in the instant proceeding are:

- the necessity of setting separate, presumptively applicable conventions for establishing rental prices for electric utility conduit and duct systems as compared to telecommunications conduit and duct systems; and
- the necessity of pricing transmission tower attachments differently from pole attachments, if and to the extent the Commission has jurisdiction over transmission towers.

Finally, equally applicable to this proceeding are the Electric Utilities' policy-related remarks contained in their the Phase I Comments regarding the avoidance of any cross-subsidization between industries, and the need to move toward a more market-based approach to pricing, particularly through the adoption of policies which encourage and reward successful negotiation.

II. CALCULATION OF ATTACHING ENTITIES

The 1996 Act requires the Commission to revise the pole attachment formula so that utilities may recover the costs of providing space on their poles based in part on the concept of "other than usable space" (or, as used herein "unusable space").[4] It is essential that the Commission, in implementing Section 224(e), stay within the clear boundaries established by the statute. While the Electric Utilities believe that the Commission's current and proposed rules in many respects follow this commandment, in other, very important respects, the Electric Utilities believe that several of the proposals in the NPRM stray far from the language and intent of the statute.

A. Who Are Attaching Entities?

The Electric Utilities support the Commission's proposal to automatically allocate one-third of unusable space to the utility[5] that owns the pole. NPRM at para. 22. The other two-thirds is allocated under Section 224(e)(2) to "attaching entities."[6] Only a "cable television system" or "provider of telecommunications service" can have a "pole attachment" within the meaning and intent of Section 224 given the definition of "pole attachment" therein. Section 224(a)(4) provides:

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4. 47 U.S.C. § 224(e).

5. "Utility" is defined as "any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications." 47 U.S.C. § 224(a)(1).

6. The term "entity" is not defined, but in context is clearly synonymous with "person," which is defined as "an individual, partnership, association, joint stock company, trust, or corporation." 47 U.S.C. § 153(32).

> The term "pole attachment" means any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.

47 U.S.C. § 224(a)(4). In addition, the statute specifies that "the term 'telecommunications service' means the offering of telecommunications[7] for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § (3)(46) (footnote added). Accordingly, only a cable system or telecommunications service provider can be an "attaching entity" under Section 224(e)(2).

From this it follows that two-thirds of unusable space can be allocated only among (i) cable entities, and (ii) telecommunications service entities.[8] The Electric Utilities believe that the latter category would include ILECs, as they provide telecommunications service, even though they are not "telecommunications carriers" for purposes of Section 224 jurisdiction and pricing.[9] This approach would appear to spread the costs of unusable space over more entities, decreasing the cost burdens on any one entity.

Conversely, attachments made for traffic, festoon or pedestrian lighting, or for similar public uses, are not made by "attaching entities" and thus are not "pole attachments," because they are not attachments providing "telecommunications service" or "cable service." See 47

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7. "Telecommunications" is defined at 47 U.S.C. § 153(43).

8. The Electric Utilities concur with the Commission's suggestion that to the extent electric utilities, directly or through a subsidiary, provide telecommunications service as defined in the Act, they become an attaching entity with respect to poles used for providing such services. NPRM at Para. 22. The Electric Utilities also note, however, that the majority of their communications systems are currently in private use and not subject to the Act.

9. The Electric Utilities note that the inclusion of ILECs as a "telecommunications service entity" may not be a foregone conclusion, and that a persuasive argument could be made under the statute that ILECs are not "attaching entities" subject to the allocation of unusable space.

U.S.C. §§ 153(7), 153(46), 602. The Electric Utilities believe that, without question, the proposal to include such fixtures as "attachments," or to deem their owners "attaching entities," NPRM at para. 24, contradicts the statute and exceeds Commission authority.

B. Only "Entities," Not "Attachments," Can Be Counted

The NPRM seeks comment on whether a carrier should be considered a separate entity for each attachment, or each foot or partial foot of space occupied on a pole. NPRM at para. 23. It similarly seeks comment on whether each overlash or user of dark fiber should be deemed to create a separate entity. NPRM at para. 25. From the plain language of the statute, the clear answer to both these questions is "no."

The Commission seems to recognize that "entities" -- not "attachments" -- are the relevant touchstone for allocating the two-thirds of the unusable space pursuant to Section 224(e)(2). NPRM at para. 22. No reasonable construction of the statute supports the conclusion that a new "entity" is created by each attachment or each increment of usable space occupied. While this would satisfy the Commission's apparent impetus to make the denominator bigger for purposes of calculating the rate under Section 224(e)(2), it would also ride roughshod over the plain language of the statute. The statute is clear that "[a] utility shall apportion the costs of providing space . . . other than usable space among *entities* . . . ." 47 U.S.C. § 224(e)(2) (emphasis added). Had Congress intended for a concept other than "entities" to drive the allocation of unusable space, Congress would have written a different statute. Congress' intent is apparent from the fact that "usable space," unlike "unusable space," is allocated precisely on the basis of "the percentage of usable space required."[10] Unusable

10. See 47 U.S.C. § 224(e)(3).

space, on the other hand, is allocated on a per capita basis.[11] Hence, it is the number of entities, not attachments, that drives the calculus of Section 224(e)(2).

C. Number of Attaching Entities Per Pole

The Electric Utilities support the Commission's proposal that each utility be permitted to develop a presumptive average number of attaching entities on dual-use poles. NPRM at para. 26. There is no other practical alternative. Currently, most of the Electric Utilities have limited data on the number of attachments per pole or the actual entities attached to each pole. Before the new formula implementing Section 224(e) goes into effect, the Electric Utilities will have to gather additional data and develop fair estimating methods. To maintain an inventory of each pole, and to break down costs so precisely that poles with different numbers of entities attached thereto would have different rental rates, would be cost prohibitive and counter-productive. Similarly, a breakdown by rural, suburban and urban zones would not be cost-effective. While urban locations may have more wires attached to their poles, there may in actuality be no more entities attached to those poles, the factor which is the controlling statutory principle for establishing just and reasonable charges under Section 224(e).

III. OVERLASHING

Overlashing has become a common practice and has created, and continues to create, significant difficulties for pole owners. Existing attaching entities do not always obtain permission to overlash. Moreover, with the advent of fiber-optic technology, attaching entities

11. See 47 U.S.C. § 224(e)(2).

are tending to create loops of various shapes to build excess line length into their systems.[12] These practices affect wind and ice loadings, as well as sag,[13] which negatively impact other attaching entities. Overlashing and related practices also complicate maintenance and pole relocation and replacement by the electric utility.

The Commission must recognize the unique issues inherent in the practice of overlashing. As suggested above, overlashing places a significant additional burden on utility poles due to added weight and tension. Utility lore is rife with anecdotal evidence of poles being damaged, or even snapping in two at the point of attachment, because too many holes have been drilled in the pole in order to accommodate overlashing. In order to avoid this problem, stronger, higher class poles must often replace the existing poles to accommodate the additional weight and tension caused by overlashing. In order to take this preventive step, however, the Electric Utilities must (i) have knowledge that an overlashed attachment is being made, and (ii) be able to directly charge the overlashing entity for the non-recurring make-ready cost of, where necessary, replacing the existing facility with a stronger, higher class pole. The only way to satisfy these prerequisites is for the Commission to require overlashing entities to notify the utilities of their intent to overlash and to pay reasonable rents and the direct costs of attachments for same.

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12. This is to provide future flexibility for pole relocation and to avoid the expense of future splices required by such activity, in that it is much more expensive and problematic to splice fiber than it is to splice copper wire. See Reply Comments at Exhibits 7-8 (photos).

13. For a discussion of sag, see the Electric Utilities' Initial Comments at 36 n.51; Reply Comments at 18-22.

The Commission should affirmatively state that the Electric Utilities may require permits, prior notice, and compliance with reasonable engineering and make-ready requirements before any attacher overlashes. The Commission should also specify that the Electric Utilities must have a contract with any party who overlashes. These prerequisites are essential to assure that properly qualified personnel work on and around electric distribution systems, to protect the integrity and reliability of the distribution system, and to ensure that risk and liability are properly and fairly allocated.

In addition to necessary and reasonable operational terms, conditions and controls, the Electric Utilities believe that they should be entitled to charge a separate rental fee for each cable attached to their distribution system. The statute requires the Electric Utilities to provide "nondiscriminatory access" to their poles.[14] The statute is silent, however, as to how many cables an attaching entity may attach for a single fee. In establishing the maximum, presumptively applicable rate electric utilities may charge, it would be entirely consistent with the statute -- and common sense -- to assume that each cable equals one "attachment." Attaching entities are entitled as a matter of law only to the right to string a cable -- not a community of overlashed cables.

With the ceiling provided by the formula in place for each cable, parties could and would negotiate mutually agreeable rates for bundled cables that would reflect competitive economic realities. Attaching entities would have an incentive to design efficient systems and to negotiate deals which would minimize make-ready costs, and pole owners would have an incentive to

14. 47 U.S.C. § 224(f).

avoid having to deal with multiple attachments and the consumption of precious space on poles. Such a regime would be consistent with the dual objectives of encouraging negotiated rates and nurturing the evolution of a competitive marketplace for telecommunications services.

Due to the shortcomings in the Commission's pole attachment formula identified by the Electric Utilities in their Phase I Comments, pricing for pole attachments is currently so low that the Electric Utilities are unduly burdened by the presence of third parties on their poles. The proliferation of multiple bundles of cable using the same physical attachment point on a pole only adds to this burden. Having to pay something for each additional cable would bring discipline to the system. The situation can be analogized to renting a room in a hotel -- the more persons per room, the higher the room rate. The present state of affairs on utility poles, however, is more akin to the chaos at spring break where rooms designated (and rented) for a single person may be jam-packed with a dozen unruly teenagers.

As an absolute minimum, the Electric Utilities should be permitted to control and charge separately for overlashing by third parties or the subletting of the right to overlash. Otherwise, cable and telecommunications providers already using electric utility poles will, by subletting overlashing rights, appropriate for themselves revenues which by statutory mandate belong to the pole owner. In the case of an overlash by a third party, the permission of both the electric utility and the existing attaching entity should be required, thus protecting the interests of both parties. As the overlashing third party has a statutory right under Section 224(f) to make a separate, non-overlashed attachment of its own, overlashing should be left totally to negotiation.

Whatever the Commission decides as to whether cable or telecommunications attachers should be able to overlash, whether space for overlashed cables may be sublet to other users, or whether, where attachers overlash with dark fiber, subletting of capacity within the fiber should be permitted, *see* NPRM at para. 15, the Commission should recognize that each overlashed cable equals a separate attachment for which the overlasher may be charged a just and reasonable rental rate. The Commission's "holding" in *Heritage Cablevision Assocs. v. Texas Utils. Elec. Co.*, 6 FCC Rcd 7099 (1991), *recon. dismissed*, 7 FCC Rcd 4192, *aff'd sub nom.*, *Texas Util. Elec. Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993) ("*Heritage Cable*"), to which the Commission clings, NPRM at para. 14, dealt solely with the issue of services provided over <u>one</u> wire owned by an attacher, **<u>not</u>** multiple or overlashed attachments. The Court in that case clearly based its analysis on whether different telecommunications services were being provided in "some *strands* within ***<u>the cable</u>***." 997 F.2d at 933 (emphasis added). In so doing, the court quoted the Commission's statement that:

> [It] is not to say that a utility could never adjust upward a regulated rate when cables are piggy backed . . . if the utility could make a showing of increased costs that cause the regulated rate to fall outside the bounds of the statutory formula.

Id. at 936. In other words, the court and the Commission clearly contemplate that pole owners could show, as do the Electric Utilities, *supra*, that overlashed cables create additional costs. Furthermore, the court explicitly recognized that the Commission's conclusion regarding overlashing was only an "undisputed assumption" that "overlashing . . . requires only a single attachment to the pole with no additional guying or anchoring," the rent for which should "remain the same irrespective of the presence of the additional wire." *Id.* (citing FCC Br. at 7).

Due to wind and ice loadings and other effects, these presumptions are fallacious, and significant grounds exist for treating an overlash as an attachment in its own right. Overlashing requires the installation of a stronger, higher class pole, additional sag clearance space, and additional guying and anchoring support. The Electric Utilities' proposal to set maximum, presumptively applicable rates for each cable, and to rely on negotiation as the primary tool for pricing overlashed bundles, is totally consistent with the Act, prior precedent and sound policy in a competitive marketplace.[15]

IV. SPACE REQUIRED FOR TELECOMMUNICATIONS ATTACHMENTS

The Electric Utilities propose no changes in the usable space allocation for cable and for ILECs other than those proposed in the Phase I Comments related to allocation of the 40-inch safety space. ILECs have traditionally required and paid for 3 feet of usable space and shared the cost of unusable space.[16] For telecommunications carriers now entering the market, particularly to the extent that most of them are using fiber cable, the Electric Utilities agree that one foot plus 40-inches of safety space is all that is required. Consistent with their Phase I Comments, the Electric Utilities propose that the Commission assume for these purposes the presence of one cable attachment and one telecommunications attachment per pole and that the 40-inch safety space be split between the two. The usable space for cable and for

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15. The Electric Utilities emphasize that, however the Commission resolves these issues, only entities that directly pay a fee to the pole owner should be counted in the denominator in apportioning the cost of unusable space pursuant to Section 224(e)(2).

16. The three feet was required in part due to the use of older copper cable and in part to provide for future growth.

telecommunications service providers other than ILECs would therefore be the same -- 32 inches. See Initial Comments at 40-43.

Without repeating the analysis set forth in the Electric Utilities' Phase I Comments, the Electric Utilities urge the Commission to abandon its preliminary determination to allocate the 40-inch safety space to the utility. NPRM at para. 20. There is no factual basis for such a conclusion. The stated rationale for assigning this cost to the electric utility -- compliance with the NESC -- applies not only to electric utilities, but to other attaching entities as well.[17]

The purpose of the NESC rules is to safeguard persons during the installation, operation, or maintenance of electric supply and *communications lines and associated equipment*. NESC § 1.010. These rules cover electric supply and communications lines, equipment, and associated work practices employed by electric, communications, or similar utilities, or railways, whether they be public or private, in the exercise their function as utilities. NESC § 1.011. All electric supply and communications lines and equipment must be designed, constructed, operated, and maintained to meet the requirements of these rules. NESC § 1.012.

More to the point, without the 40-inch safety space, cable and telecommunications entities cannot place attachments on electric utility poles. The 40 inches therefore constitutes space used by them - not the electric utilities. Indeed, under the Commission's logic as stated in the NPRM, electric utilities would be responsible for the entire nineteen-plus feet required for

17. For example, the owners of cable and telecommunications wires and facilities may be cited for failure to satisfy the requirements of the NESC. In the event of accident or injury, the NESC could be cited in establishing tort liability against cable and telecommunications providers.

ground clearance since that also emanates from the NESC. The Commission has, however, unlike the 40-inch safety space, recognized that the nineteen feet comprise unusable space that must be shared by all entities on a pole. Attempting to foist the cost of the 40-inch safety space on the electric utility industry is one of the most glaring examples of the sort of improper, cross-industry subsidization the Electric Utilities respectfully urge the Commission to bring to an end.

V. CALCULATION OF RENTAL CHARGES

It should be noted at the outset that the statutory language governing establishment of presumptively applicable, maximum rental rates for telecommunications carriers post-2001 differs from that for setting cable rates and pre-2001 telecommunications charges. Section 224(d)(1) prescribes a rate between marginal cost and fully allocated cost. By contrast, Section 224(e)(1) simply directs the Commission to develop regulations -- for use only where negotiation fails -- which assure that a "utility charges just, reasonable, and nondiscriminatory rates for pole attachments."[18]

The statute thus provides the Commission very broad latitude in how it determines that rates are just and reasonable. Nothing in this proceeding suggests that market-based rates, forward-looking, or replacement costs are not just and reasonable. In recognition that the presumptively applicable rate is no more than a safety net for failed negotiation, the Electric Utilities urge the Commission to provide the marketplace as much latitude as possible in setting pole rental rates.

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18. 47 U.S.C. § 224(e)(1).

The Commission could implement this suggestion of the Electric Utilities by setting a presumptively applicable maximum charge at or near the cost of replacing the system. Replacement cost is the outside limit a new market entrant generally faces in a competitive market. In the current context, however, even at replacement cost, the new entrants' savings are huge since, by operation of law, access is guaranteed and the sharing of costs is mandated. At the starting line, therefore, new market entrants are favored by operation of law, even if the Commission adopts a replacement cost ceiling. Where replacement cost is not the right measure, market forces will drive prices downward and the intent of the statute will be met. In any event, there will be incentives to negotiate and reduce the regulatory burden of resolving complaints, and competition and market forces will drive the industry.

The Electric Utilities believe that the current formula, once amended to reflect the Electric Utilities' position in their Phase I Comments, should be used to establish presumptively applicable, maximum charges, provided that the formula is further modified for purposes of Section 224(e)[19] by using replacement capital costs rather than book costs. The Electric Utilities, in their Phase I Comments, recommended the same approach for electrical conduit systems, and the logic and support underlying that recommendation is incorporated herein by reference.[20]

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19. The Electric Utilities understand the Commission's statement that it finds "this methodology to be as applicable to telecommunications carriers as to cable carriers," NPRM at para. 33, to mean not that the new formula will apply to cable systems, but that the rationale and variables used in arriving at the old formula apply equally for creation of the new formula for telecommunications carriers.

20. A refinement might be to use a five-year levelization convention to reflect the fact that the system would not be built every year.

VI. CONDUITS

The Electric Utilities have articulated, in the Phase I Comments, their position on how conduits must be treated. The only new element in setting rates under Section 224(e) is identifying unusable space. The Electric Utilities posit that the only usable space is the duct itself. The remainder of the conduit system is like the underground portion and the first 19-plus feet of a pole -- it is unusable and exists only to render the duct useful and accessible. It is the duct, and only the duct, that gets used.

Accordingly, ducts should be allocated on the ratio of the number of ducts used by the attaching entity (or entities) to the number total ducts in the conduit. The remainder of the costs should be allocated one-third to the electric utility and two-thirds to the attaching entities.

VII. RIGHTS OF WAY

The Electric Utilities do not believe that it is feasible to establish a single pricing methodology for resolving disputes over use of rights of way where negotiation fails. Due to differences in state laws, the actual terms of existing easements, the vintage and affect of vintage on both the price paid and the rights secured for easements, the costs paid for various types of easement rights, and variations in the way records are kept, it would be impossible to construct a fair model or formula for national use.

The Electric Utilities also believe that requests for use of rights of way will be relatively modest and not of sufficient volume to warrant special rules. Most attaching entities can and do currently secure the right to use public streets and ways, which is where most rights of way

are located. In addition, private rights of way are available for purchase and in some cases condemnation, depending on the extent of the condemnation rights of the telecommunications carrier and state law.

VIII. PHASE-IN

The Electric Utilities believe that the Commission has virtually no discretion under the phase-in language contained in Section 224(e)(4). The Electric Utilities therefore support the concept of a phase-in over five years in equal increments. NPRM at para. 44.

IX. MISCELLANEOUS

The Electric Utilities note that in its regulatory flexibility analysis, the Commission asserts that wireless entities are entitled to attach to poles at rates consistent with the Commission's rules generally applicable to pole attachments. NPRM at para. 61. The Electric Utilities do not agree and direct the Commission's attention to the Electric Utilities' Reply Comments in CC Docket No. 97-98 at 34-37.

The Electric Utilities also believe that as cable companies migrate toward becoming telecommunications service providers, there must be some means of ascertaining their status.[21] The cable companies have the best access to the information necessary to establish their actual status regarding the provision of telecommunications services. As the least expensive means of

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21. This is so because after the year 2001, when a cable company is or becomes a telecommunications provider, the presumptive, maximum just and reasonable rental rate applicable to the company changes from that set forth in Section 224(d) to that contemplated by Section 224(e).

obtaining such information would be for the cable companies to provide it, the burden of doing so rests with them. Accordingly, beginning with the effective date of charges authorized under Section 224(e), the Electric Utilities believe that the Commission should authorize pole owners to treat each cable entity as if it is a telecommunications provider unless the cable entity has filed a certificate with the Commission, and served a copy on the pole owner, to the effect that it is operating solely as a cable provider. Such certificates should be required annually.

The Commission should adopt a mechanism or presumption for determining when the end of useful negotiations between attachers and cable companies has occurred, rather than continuing to rely upon merely the bald and self-serving assertions of a Complainant attacher.[22] In two recent cases, the Commission has been presented with complaints filed by cable attachers which either failed to disclose all of the relevant facts, or attempted to bring a dispute to the Commission which involved contracts which were still in draft phase, and which had not yet been negotiated or executed by any cable attacher.[23] Not only does this abuse of the complaint system tax Commission and utility resources, it generates additional costs which must be passed through by the electric utility to other attachers or the electric utility rate payers. The Electric Utilities request that the Commission impose, as a condition precedent to bringing a complaint action before the Commission under Subpart J of Part 1 of the Commission's Rules,[24] a minimum 180-day negotiation period as the minimum sufficient to demonstrate a good faith

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22. See 47 C.F.R. § 1.1404(i).

23. *Texas Cable & Telecom. Assoc. v. Entergy Servs., Inc.*, PA 97-005, filed July 9, 1997; *Cable Texas, Inc. v. Entergy Servs., Inc.*, PA 97-006, filed July 9, 1997.

24. 47 C.F.R. § 1.1401, et seq.

attempt to negotiate any issue or pole attachment agreement.[25] The Electric Utilities also request that the Commission adopt rules providing that, should an attacher bring a complaint that fails to satisfy this requirement, or to properly cite all of the facts relevant to the complaint, the Complaint will be dismissed,with prejudice.[26]

Finally, the problem of unauthorized attachments continues to plague pole owners. Cable companies are not all equally scrupulous about following the rules, and too many wait to get caught. It is time, the Electric Utilities believe, for the Commission to step forward and affirmatively authorize pole owners to collect a meaningful fee which would motivate the less scrupulous companies to pay their rental fees on a current basis and to seek authorization before attaching their wires and equipment to the Electric Utilities' facilities.

X. CONCLUSION

The Electric Utilities urge the Commission to carefully consider the Electric Utilities' Comments filed in CS Docket No. 97-98, which are incorporated by reference herein, as they affect the formula at issue in this proceeding. Particular attention is called to the necessity of creating separate rates for 30-foot and 40-foot pole classes and assigning the 40 inches of safety space to telecommunications attachers. Also critical is the need to include additional FERC accounts in the calculation of costs, as detailed in the Comments filed in CS Docket No. 97-98.

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25. This requirement would be similar to the time periods set forth in the 1996 Act for interconnection arbitration proceedings. 47 U.S.C. § 252.

26. The Commission should adopt rules to the effect that, in such an instance, the electric utility may charge all of its costs associated with such complaint directly to the attacher, rather than loading them into the formula as administrative costs (whereupon the costs will be borne by all the utilities' other attachers) or simply eating the costs (whereupon the costs will be passed along to electric ratepayers).

For purposes of implementing Section 224(e)(2), only "attaching entities" should be counted. The number of attachments per entity in usable space and the number of feet of occupied usable space are irrelevant for such purpose. Entities attaching traffic signals and other attachments which do not fall within the definition of "telecommunications services" should not be counted in allocating unusable space. The number of attaching entities per pole should be established by each company using a reasonable methodology consistent with reasonably available data.

Usable space for telecommunications carriers other than ILECs should be 12 inches plus the 40-inch safety zone. The 40-inch safety zone, however, is presumed to be shared with one cable and one telecommunications carrier, resulting in a 32-inch allocation of usable space for each.

Pricing under Section 224(e) should be much more flexible than under Section 224(d) due to the less constraining language of the statute and the intent and purpose of the 1996 Act. Forward-looking replacement costs should be used to establish the capital component of presumptively applicable, maximum just and reasonable rates. Overlashing should be permitted only through adequate notice, submission of an application, and negotiation of a rate, with a presumptively applicable maximum rate set as though each cable were a separate attachment.

Electric conduits are different from telecommunications conduits. They should be priced on a company-specific basis using replacement costs. Only the actual ducts are usable. All

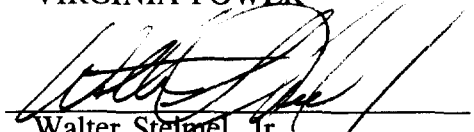
other portions of conduit systems should be deemed unusable. Finally, rights-of-way are so unique that no presumptively applicable rate can be set on a generic basis.

Respectfully submitted,

CAROLINA POWER & LIGHT COMPANY
DELMARVA POWER & LIGHT COMPANY
ATLANTIC CITY ELECTRIC COMPANY
ENTERGY SERVICES
- ENTERGY ARKANSAS, INC.
- ENTERGY LOUISIANA, INC.
- ENTERGY GULF STATES, INC.
- ENTERGY NEW ORLEANS, INC.
- ENTERGY MISSISSIPPI, INC.

FLORIDA POWER CORPORATION
PACIFIC GAS AND ELECTRIC COMPANY
POTOMAC ELECTRIC POWER COMPANY
PUBLIC SERVICE COMPANY OF COLORADO
SOUTHERN COMPANY
- GEORGIA POWER
- ALABAMA POWER
- GULF POWER
- MISSISSIPPI POWER
- SAVANNAH ELECTRIC

TAMPA ELECTRIC COMPANY
VIRGINIA POWER
- NORTH CAROLINA POWER
- VIRGINIA POWER

By: 

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